



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 21, 2004

Ms. Sunny Y. Lin
Henslee, Fowler, Hepworth & Schwartz, L.L.P.
816 Congress Avenue, Suite 800
Austin, Texas 78701

OR2004-5047

Dear Mr. Lin:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 203789.

The Alief Independent School District (the "district"), which you represent, received a request for information pertaining to a named individual, the district's FFA complex, and a specified incident. You state that some information has been released but claim that the remaining information is excepted from disclosure under sections 552.026, 552.101, 552.108, 552.114, 552.135, and 552.137 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

You assert that portions of the submitted information are excepted from disclosure under section 552.101 of the Government Code in conjunction with the doctrine of common-law privacy. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and

¹In your letter to this office, dated April 30, 2004, you withdrew the district's request for a decision with regards to certain documents. We note that this ruling does not address those documents.

injuries to sexual organs. 540 S.W.2d at 683. However, upon review, we find that the submitted information either is not highly intimate or embarrassing for the purpose of common-law privacy or is of legitimate interest to the public. *See* Open Records Decision Nos. 622 at 2 (1994) (social security numbers are not protected by common-law privacy), 611 at 1 (1992) (family violence generally not considered private), 405 at 2-3 (1983) (public has interest in manner in which public employee performs his job). Therefore, none of the submitted information may be withheld under section 552.101 in conjunction with common-law privacy.

You also assert that portions of the submitted information are excepted from disclosure under section 552.101 in conjunction with the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), section 1232g of title 20 of the United States Code.² FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. §1232g(b)(1). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). This office generally applies the same analysis under section 552.114 of the Government Code and FERPA. Open Records Decision No. 539 (1990).

Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. Section 552.026 of the Government Code provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

Gov't Code § 552.026. In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception. Information must be withheld from required public disclosure under FERPA to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 (1982), 206 (1978).

²Section 552.101 also encompasses information made confidential by other statutes.

You indicate that the district maintains most of the submitted information, which directly relates to district students and parents. We find that the portions of this information you have highlighted, along with additional information we have marked, must be withheld pursuant to FERPA.³ However, you also indicate that Exhibit B consists of records maintained by the Alief Independent School District Police Department (the “department”) for purposes of law enforcement. The department’s records do not constitute “education records” for purposes of FERPA. *See* 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. § 99.8(b)(1) (2003) (defining law enforcement records); Open Records Decision No. 612 (1992) (term “education records” does not include records maintained by law enforcement unit of educational agency or institution created by that law enforcement unit for purpose of law enforcement). Therefore, the district may not withhold any portion of Exhibit B under FERPA.

You also assert that Exhibit B is excepted from disclosure under section 552.108 of the Government Code. Section 552.108(a) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime.” Gov’t Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You indicate that Exhibit B relates to a pending criminal investigation. Based on your assertion and a review of this information, we believe that release of this information “would interfere with the detection, investigation, or prosecution of crime.” Gov’t Code § 552.108(a)(1).

However, section 552.108 is inapplicable to basic information about an arrested person, an arrest, or a crime. Gov’t Code § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, with the exception of the basic front page offense information, you may withhold Exhibit B from disclosure based on section 552.108(a)(1). We note that you have the discretion to release all or part of Exhibit B that is not otherwise confidential by law. Gov’t Code § 552.007.

The basic information that must be released under section 552.108(c) includes the identity of the complainant. You assert that this information is excepted from disclosure under section 552.101 in conjunction with the informer’s privilege.⁴ We note that the informer’s privilege does not categorically protect from release the identification and description of a complainant, which is front page offense report information generally considered public by

³As we are able to make this determination, we do not address your remaining arguments against the disclosure of this information.

⁴The informer’s privilege is incorporated into the Public Information Act (the “Act”) by section 552.101 of the Government Code.

Houston Chronicle. See Gov't Code § 552.108(c); 531 S.W.2d at 187; Open Records Decision No. 127 (1976). The identity of a complainant, whether an "informant" or not, may only be withheld upon a showing that special circumstances exist. As you do not claim that special circumstances exist in this instance that would require the protection of the complainant's identity, we conclude that this information may not be withheld under section 552.101 on the basis of the informer's privilege. See Open Records Decision No. 169 at 6-7 (1977) (concluding that "special circumstances" refers to very narrow set of situations in which release of information would likely cause someone to face "an imminent threat of physical danger" and that initial determination of such circumstances must be made by governmental body that receives request).

You also claim that portions of Exhibit C are excepted from disclosure under section 552.101 and the informer's privilege. The common-law informer's privilege has long been recognized by Texas courts. See *Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The informer's privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing WIGMORE, EVIDENCE, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. See Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988). With regard to the information at issue in Exhibit C, you have not demonstrated that these documents constitute reports of possible violations of criminal or civil statutes that were made to an official having a duty to enforce the law. Thus, we find that the district has not adequately demonstrated that the informer's privilege is applicable to this information. See, e.g., Open Records Decision Nos. 542 (1990) (concluding that Act places on governmental body burden of establishing why and how exception applies to requested information), 532 (1989), 515 (1988), 252 (1980). Consequently, none of the information in Exhibit C may be withheld under section 552.101 and the informer's privilege.

You also assert that the identity of the "reporting party" in Exhibit B and "various email correspondences written by school employees" in Exhibit C are protected by section 552.135. This section provides in part:

- (a) "Informer" means a student or former student or an employee or former employee of a school district who has furnished a report of another person's or persons' possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

Gov't Code § 552.135(a)-(b). Because the legislature limited the protection of section 552.135 to the identity of a person who reports a possible violation of "law," a school district that seeks to withhold information under this exception to disclosure must clearly identify the specific civil, criminal, or regulatory law that is alleged to have been violated. *See* Gov't Code § 552.301(e)(1)(A). Section 552.135 requires the informer to report a violation of law to the school district. The department is part of the school district. *See* Educ. Code §37.081. Based on our review of your arguments and the submitted information, we find that the conduct reported to the department pertaining to this matter concerns a possible violation of criminal, civil, or regulatory law under section 552.135. However, the individual listed as the "reporting party" in Exhibit B is not a student or employee of the district. Therefore, the identity of this individual may not be withheld under section 552.135. In addition, we find that you have not demonstrated that any of the information at issue in Exhibit C contains a report of a violation of the law. Accordingly, we determine that the district may not withhold any portion of Exhibit C under section 552.135.

You assert that a portion of the remaining information is subject to section 552.137 of the Government Code, which provides:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Gov't Code § 552.137. Section 552.137 excepts certain e-mail addresses of members of the public that are not within the scope of section 552.137(c), unless the relevant members of the public have affirmatively consented to the release of the e-mail addresses. We note, however, that section 552.137 does not apply to the work e-mail addresses of officers or employees of a governmental body, a website address, or the general e-mail address of a business. Because the remaining e-mail address in the submitted information is the general e-mail address of a business, the district may not withhold this information under section 552.137, and it must be released.

In summary, the district must withhold the information you have highlighted, along with the additional information we have marked, in Exhibit C under section 552.101 and FERPA. With the exception of basic front page offense information, the district may withhold Exhibit B pursuant to section 552.108. The remaining submitted information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body

fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Amy D. Peterson
Assistant Attorney General
Open Records Division

ADP/sdk

Ref: ID# 203789

Enc. Submitted documents

c: Ms. Elaine B. Roberts
Bruckner Burch P.L.L.C.
5847 San Felipe, Suite 3900
Houston, Texas 77057
(w/o enclosures)